

H9B8TUCF

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

16 Cr. 91 (PKC)

5 SCOTT TUCKER,  
6 TIMOTHY MUIR,

7 Defendants.

Trial

8 -----x

September 11, 2017  
4.45 p.m.

9 Before:

10 HON. P. KEVIN CASTEL

11 District Judge

12 APPEARANCES

13 JOON H. KIM  
Acting United States Attorney for the  
14 Southern District of New York  
BY: NIKETH V. VELAMOOR  
15 HAGAN C. SCOTTEN  
SAGAR K. RAVI  
16 Assistant United States Attorneys

17 FREEMAN NOOTER & GINSBERG  
Attorneys for Defendant Tucker

18 BY: LEE A. GINSBERG  
NADJIA LIMANI

19 -and-  
STAMPUR & ROTH  
20 BY: JAMES M. ROTH

21 BATH & EDMONDS, P.A.  
Attorneys for Defendant Muir

22 BY: THOMAS J. BATH  
-and-

23 BEVERLY VAN NESS  
24  
25

1 THE COURT: Are there any jurors, potential jurors  
2 remaining in the courtroom? If so, please raise your hand.

3 There do not appear to be any.

4 Unless there is something we need to discuss, see you  
5 tomorrow morning.

6 Yes, sir.

7 MR. SCOTTEN: Your Honor, so there is at least one  
8 legal issue the government is aware of, and I think there may  
9 be one the defendants are also concerned with, that we would  
10 like the Court's ruling on before openings. It doesn't have to  
11 be now; we are not opening first thing tomorrow morning. If  
12 it's convenient for the Court, we can do it now or later.

13 THE COURT: What is it?

14 MR. SCOTTEN: The issue that the government is  
15 concerned with is the scope of the Court's ruling on legal  
16 evidence other than advice of counsel evidence. We had a  
17 discussion with Mr. Bath, and he has a different take on the  
18 Court's ruling than we do. So we thought it best to ask for  
19 clarification because it may affect how the parties open.

20 As you know, we moved essentially to keep out all  
21 legal evidence other than that within an advice of counsel  
22 defense. We argued it mostly about the defense expert, but our  
23 belief was the Court granted our motion. I am not sure exactly  
24 what Mr. Bath's interpretation is, but I think he sees it more  
25 narrowly. I think the area of particular concern is, as you

1 know from our initial papers, your Honor, Mr. Muir's defense,  
2 at least in part, appears to be there were other lawyers  
3 involved here, generally; not that these lawyers came to me and  
4 told me what I was doing was lawful, but just they were around,  
5 the atmospheric impression of lawyers being there led me to  
6 believe it's more lawful. We don't think that's proper. We  
7 cited the reasoning in the Floury case, which I think is quite  
8 persuasive. We think the Court granted that motion, but if it  
9 didn't, or if it granted it in part, we'd like to know.

10 THE COURT: I think I granted it, but implementing it  
11 is a different situation. Because the nature of in limine  
12 rulings, when you seek an in limine ruling, it has something of  
13 an abstract quality to it because it's not always a ruling that  
14 attaches to the admission or exclusion of a specific exhibit or  
15 the specific testimony of a witness.

16 Let me hear from Mr. Bath.

17 MR. BATH: Thank you, Judge.

18 Judge, it is our position that Mr. Muir has a good  
19 faith defense, and I realize the Court hasn't made a final  
20 ruling on that, you haven't heard all the evidence yet. A part  
21 of that good faith defense is that Mr. Muir was hired about  
22 2006, began working on behalf of Mr. Tucker's entities, was  
23 hired by Mr. Tucker, was later engaged by the tribes. He did  
24 his own research. He did his own CLEs. He came to his own  
25 conclusions. But part of his good faith defense is, he also

1 worked with other leading Native American firms in the country  
2 who came to the conclusion that he came to, which was this was  
3 a legal operation.

4 THE COURT: Let me find out from the government.

5 Mr. Muir takes the stand and he says, I acted in good  
6 faith. I spent 49 hours on Westlaw searching and reading  
7 cases. I read the cases inside out. I picked up the phone,  
8 because I wasn't satisfied from my reading of the cases, and I  
9 asked people who were knowledgeable in this area whether they  
10 read the case the same way I did. Is that inadmissible  
11 evidence?

12 MR. SCOTTEN: As the Court has phrased it, I don't  
13 think so, your Honor. Certainly, Mr. Muir can testify as to  
14 the law he personally observed, that has been put on his state  
15 of mind. So I agree he can say, I spent 49 hours on Westlaw,  
16 and based on that, I believe what I did was lawful. It is more  
17 problematic when he is essentially bringing in advice of  
18 counsel, but not meeting the requirements of the defense. I do  
19 think those limits still apply. He can't just say, I got an  
20 abstract opinion on my ruling of --

21 THE COURT: It's not an abstraction. I suppose not  
22 every lawyer gets to the bottom of a legal problem exclusively  
23 by reference to what pops up on a Westlaw screen or a Lexis  
24 screen. So you might ask another assistant United States  
25 attorney in your office about an issue. You have read the

1 case. This is the way I read the case. Am I missing something  
2 here? That offhand doesn't strike me as objectionable. I have  
3 to hear what it is. Maybe I haven't thought about it enough,  
4 and maybe that's why I am asking the question here. But my  
5 reaction to that is that's lawful and permissible.

6 What doesn't sound to me to be admissible is to say,  
7 you know when I arrived on the scene, there were a lot of  
8 lawyers, who I guess they must have kicked the can, they were  
9 working there, none of them had quit. So I just, you know,  
10 basically assumed that this must be legal because they are  
11 members of the bar and they wouldn't be doing this if it was  
12 illegal. That sort of argument presented not by the testimony  
13 of the defendant, but through somebody saying, well, were there  
14 a bunch of lawyers around on the scene when he started working,  
15 yeah, there were, is in my view not probative of any issue in  
16 this case.

17 Mr. Bath, I invite you to tell me where you agree and  
18 where you disagree.

19 MR. BATH: I think it's a matter of Mr. Muir taking  
20 the stand. I think if he takes the stand, and he is going to  
21 take the stand, and I am going to tell them that in opening  
22 statement -- and I understand that risk that maybe he will  
23 choose not to take the stand, and that's my own peril. But I  
24 think if he takes the stand and says -- actually, I would argue  
25 the combination of the two would be allowable, Judge.

1 THE COURT: I am not disagreeing with that. I think  
2 so also.

3 MR. BATH: I see the Court is saying, if I was just  
4 going to put that defense on in a vacuum, without Mr. Muir's  
5 state of mind, I can't just stick that onto his state of mind  
6 without him telling the jury that that was in fact his state of  
7 mind. So I don't think there is a disagreement here. The  
8 government can object when they think it's proper to object,  
9 and the Court will rule upon whatever it is that is before the  
10 Court.

11 THE COURT: My offhand reaction is there is something  
12 seriously wrong if a nonlawyer can present an advice of counsel  
13 defense, but a lawyer can't say, I read the cases, I studied  
14 the law, I formed my own opinion, and get to the same place.

15 Now, I understand the wrinkle on that. As I said, you  
16 can get your law exclusively from books, maybe exclusively from  
17 conversations with lawyers, or maybe a combination of both,  
18 which is how lawyers practice law, but that doesn't strike me  
19 as running afoul of anything. It's not an advice of counsel  
20 defense per se, but it's a good faith defense based on  
21 testimony.

22 You're entitled to cross-examine and say, No, you  
23 didn't look at any of that case law. You didn't spend 49 hours  
24 on Lexis. You didn't call these lawyers. What are you talking  
25 about? You're allowed to cross-examine about that. How can

1 you come to that conclusion given this, that or the other  
2 thing? I think that's fair game also. But I am not offended  
3 by the prospect of testimony coming out of the mouth of the  
4 defendant, which the government has the right to cross-examine.

5 MR. SCOTTEN: To be clear, neither are we. There may  
6 be some disagreements around the edges. Our real concern was  
7 the other category the Court is keeping out. Other than the  
8 defendant saying, based on what I observed personally, the  
9 other "weren't there a bunch of other lawyers around?" kind of  
10 defense. So I think the Court's ruling is clear on that.

11 THE COURT: Anything else?

12 MR. GINSBERG: One administrative matter, your Honor.  
13 Unfortunately, with the e-voucher system, we submitted Friday a  
14 request for the transcript from the final pretrial conference  
15 and approval for daily transcript. I am not sure that it got  
16 to the Court yet for the Court's signature, but until it  
17 does --

18 THE COURT: I orally approve it.

19 Let me see whether it's up there. It may be up there  
20 now.

21 You want expedited transcript, right?

22 MR. GINSBERG: Yes, your Honor. And daily for the  
23 trial. That was just for the pretrial conference.

24 THE COURT: It has been done.

25 See you tomorrow morning.

1           What else?

2           MR. GINSBERG: One other quick thing. We have asked a  
3 number of times, and we have not been told for certain yet, who  
4 the witnesses are for this week and the order of witnesses. I  
5 don't think we should have to keep asking over and over again.  
6 It's the end of the day on Monday.

7           THE COURT: When are you going to give Mr. Ginsberg an  
8 answer?

9           MR. SCOTTEN: I don't think Mr. Ginsberg had a chance  
10 to talk to Mr. Roth. I just told Mr. Roth at the end of the  
11 day we would discuss it. We wanted to see how far we got in  
12 jury selection. We are going to tell him right now.

13          THE COURT: Why don't you do it. Let me eavesdrop.  
14 Go ahead.

15          MR. SCOTTEN: So far all we can tell you, your Honor,  
16 is likely tomorrow.

17               One of the complications, your Honor, but --

18          THE COURT: This doesn't sound like an answer.

19          MR. SCOTTEN: It's an answer.

20          THE COURT: Not a good one.

21          MR. SCOTTEN: It's not a concrete one. We have an  
22 issue with several witnesses who are -- there's a lot of  
23 witnesses in this case flying in from out of town.

24          THE COURT: What are the defendants supposed to do in  
25 terms of getting ready for cross-examination?



1 MR. SCOTTEN: I can lay it out. They can know what we  
2 know. I am happy to share with them what we know, as far as we  
3 know.

4 THE COURT: But they don't know who to prepare for  
5 cross-examination for?

6 MR. SCOTTEN: They have a pretty good idea. If the  
7 Court wants me to give it openly or to them, we can do it right  
8 now.

9 THE COURT: Speak to defense counsel and I will just  
10 eavesdrop, but loud enough so I can hear.

11 MR. VELAMOOR: There may be a miscommunication.

12 THE COURT: Speak so we get this on the record.

13 MR. VELAMOOR: We intend to call Mr. Hamner, Richard  
14 Hamner first. If there is additional time tomorrow, we intend  
15 to call Adrian Rubin after that. If Mr. Hamner takes us to the  
16 end of the day, we have problems with Kelly Rogers. With her,  
17 she is a single mother. She has serious issues that limits her  
18 time. So we intend to start Wednesday morning with her  
19 regardless of how we end up on Tuesday.

20 THE COURT: That's pretty concrete.

21 Here is the question. How long does the government  
22 think -- how long do you think that you would like to take for  
23 your opening statement?

24 MR. SCOTTEN: About 21, 22 minutes right now. So say  
25 25.

1 THE COURT: That's a pretty precise answer.

2 Mr. Ginsberg.

3 MR. GINSBERG: Mr. Ginsberg is not giving the opening  
4 statement.

5 MR. ROTH: He has deferred to me, Judge. Around 30,  
6 35 minutes, at the most.

7 THE COURT: Mr. Bath.

8 MR. BATH: 30 or under.

9 MR. GINSBERG: Unfortunately, there is one more issue.

10 At the end of the pretrial conference the other day,  
11 if you recall, we had a discussion about what the government  
12 referred to as a summary witness with some summary charts. We  
13 have not received any 3500 material as to that summary witness  
14 or the summary material. The Court ordered the government to  
15 turn over what they had at this point and that had been  
16 compiled during the last 10, 12 days, something like that. The  
17 government made it appear, at least to my ears, as if it was  
18 something that was being done recently, and they were beginning  
19 to compile it, and they were going to get some reports done.

20 We then received Friday night by a link about 250  
21 pages of charts, reports, summaries from a forensic accounting  
22 firm that's been working on this summary chart material for the  
23 last two years. It includes e-mails back and forth from the  
24 forensic accountants to the U.S. attorneys saying, we have  
25 completed this portion so far, we have this summary done so

1 far, we have this report done so far, we are awaiting other  
2 materials so we can update it. It's not at all, in my view,  
3 the way it was portrayed the other day, number one.

4 Number two, they could have turned this over the day  
5 they were supposed to turn over the rest of the 3500 material  
6 so we wouldn't have wasted ten days without being able to give  
7 it to our forensic accountant, who they made a big fuss about.  
8 I don't want to go beyond that because this, to me, goes past  
9 sharp practice into some other realm that I don't want to name,  
10 but this is not how we practice law in the federal court in  
11 serious criminal cases.

12 THE COURT: When did the government represent they  
13 were going to turn over their 3500 material?

14 MR. GINSBERG: August 28, your Honor.

15 THE COURT: Do you want to respond, please?

16 MR. VELAMOOR: I do, your Honor, absolutely.

17 I think the discussion at the pretrial conference was  
18 very different than that. That's certainly not my  
19 recollection. I made clear in response to the Court's  
20 questions that we were intending to turn over our initial draft  
21 of the summary charts on the Friday, and we did that. I also  
22 made clear that there would be previous versions of some of the  
23 work that were done prior to the 21-day rule I think that the  
24 Court set. I made both of those things clear. I also  
25 explained at the time that we were still figuring out what was

1 going to be included or not included in the charts, and so we  
2 didn't know what to get from before to include, what would turn  
3 out to be actually previous drafts and what was actually in  
4 what we intend to offer through the summary witness.

5 I am very confident that I did not misrepresent or say  
6 anything inaccurate with what we did. And I am completely  
7 confident what we did was completely appropriate. Just for the  
8 record, we notified the defense in March that we intended to  
9 call someone from RGL, a forensic accounting firm, as a summary  
10 witness in this case, and we invited the defense to offer any  
11 objections to our use of a forensic accountant for summary  
12 purposes.

13 THE COURT: I don't think that's where this is headed  
14 at the moment. That's not the precise complaint here. The  
15 complaint here is much of the material that you're turning over  
16 as 3500 material, which you should have turned over, in the  
17 defense's view, at a date -- what date in August was it?

18 MR. GINSBERG: 28th.

19 THE COURT: Is only being turned over on September 9.  
20 That's the gist of the complaint. And while it might not have  
21 been your final version of charts, it may have been something  
22 that still needed some last-minute polishing up to the last  
23 minute, that you had the wherewithal to make a substantial  
24 production back on the 28th, but didn't do so.

25 Mr. Ginsberg, is that your complaint?

1 MR. GINSBERG: That is my complaint. I think this  
2 issue is going to go further because I think what the  
3 government is attempting to do, from my quick review of this  
4 and sending it to our accountant, is that they are going to  
5 attempt to call a forensic accountant and call that a fact  
6 witness, as opposed to a witness giving an opinion, even  
7 though -- it's our view from the material we see -- it is a  
8 compilation of facts which is then turned into an analysis and  
9 an opinion, but that's for a later date.

10 MR. VELAMOOR: This was the thinking. This forensic  
11 accounting firm has done a tremendous amount of work for us  
12 over a long time. Most of it is entirely unrelated to anything  
13 we intend to use this person for as a summary witness.

14 THE COURT: Hang on a second. August 28. I got it.  
15 If we are talking last November, maybe it hadn't taken shape.  
16 But the general parameters of what you're going to use the  
17 accounting witness for you had to know by August 28, no?

18 MR. VELAMOOR: We certainly knew we are intending to  
19 show spending from travel bank accounts; we are intending to  
20 show in some sense the volume of customers and where they came  
21 from, certainly. But to be clear, we turned over, as it  
22 happened, a draft that's actually usable, that lays out in  
23 quite clear detail exactly the kinds of spending, the kinds of  
24 information that we intend to summarize and offer through the  
25 summary witness the Friday before trial.

1           We intend to call this summary witness towards the end  
2 of our case. We are not off to a tremendously fast start given  
3 some of the jurors' obligations. We don't expect this witness  
4 to take the stand for at least two weeks. There was certainly  
5 no intention to hide the ball, nor can it be said that there is  
6 any kind of limitation on the defense ability to digest this  
7 material.

8           THE COURT: This exhibit that you're talking about  
9 that lays everything out, did you not have a draft of it at an  
10 earlier point in time, as of August 28? Couldn't you have  
11 produced your draft? This is subject to revision.

12           MR. VELAMOOR: I suppose we could have caused an  
13 actual draft to be finalized and sent to us. We did not do  
14 that. Our concern was if we offer something that was going to  
15 be supplemented in substantial ways, it was ultimately going to  
16 include additional areas of analysis, that it would bite us in  
17 the other direction.

18           THE COURT: So you're representing to me that you did  
19 not have such a draft as of August 28, although you're candidly  
20 saying, I suppose we could have asked for one, but you didn't  
21 in fact have one, is that what you're representing?

22           MR. VELAMOOR: Correct. I could have had a draft  
23 generated. We did not do that.

24           THE COURT: Mr. Ginsberg.

25           MR. GINSBERG: So I am holding in my hand two pieces

1 of paper. One is entitled "RGL Forensics" on the top. In the  
2 middle of the page it says, "Kansas/payday loan/update, August  
3 25, 2014, RGL, strictly confidential," which is the front page  
4 of an analysis and report that was contained in the material  
5 that we received on Friday.

6 THE COURT: The question is whether the government had  
7 that in its possession.

8 MR. GINSBERG: It was dated August 25, 2014.

9 THE COURT: I understand it's dated that day, but  
10 whether they had it.

11 MR. GINSBERG: I have an e-mail, which is dated 2013,  
12 which is written between the government and somebody at RGL.  
13 "Re: Kansas loan fraud investigation, master file account  
14 review, additional bank accounts identified." And it says,  
15 "Please use the attached schedules, and disregard the prior  
16 schedules, as we have had to make changes to the notes and some  
17 of the headings. Thank you." And it's signed by Kimberly  
18 Espinoza, CPA, at RGL.

19 THE COURT: Dated when?

20 MR. GINSBERG: This is dated December 19, 2013.

21 So whatever they want to call it, in whatever form,  
22 this has been going on for three, four years. They had some  
23 type of fairly final set of material by August 28th of this  
24 year. Because I have looked through this as best as I could in  
25 the time that I have had, and there is a lot of material that

1 goes back to 2013, 2014, that may not have been in final form,  
2 but was close enough in form that it should have been turned  
3 over on August 28 and then we could have sorted the rest of it  
4 out.

5 MR. VELAMOOR: Judge, I made clear that absolutely RGL  
6 did work prior to this date, and that taking a broad view of  
7 3500 material, there would be things that they did previously  
8 that would follow in the scope of 3500. But what he is holding  
9 up is by no means in any way a draft of any of the slides or  
10 charts that we intend to offer in this case. That is a tracing  
11 analysis that was essentially the first and early stage in  
12 trying to figure out how much payday lending money we can  
13 ultimately seize and obtain seizure warrants for when we  
14 indicted the case. That is a different analysis. I understand  
15 it relates to the issue of spending from travel accounts, and  
16 so it was turned over, but that is in no way a draft of the  
17 slides that we intend to offer to the jury in this case.

18 THE COURT: I have heard both sides on this issue. At  
19 the present time, I am not going to do anything based on the  
20 government's representation that they are calling this witness  
21 late in their case. There may be other relief that I may grant  
22 to the defendant, and it's not necessarily dependent upon  
23 whether there was some wrongdoing or misconduct, but as a trial  
24 judge I always have tools available to me if I feel that there  
25 is any potential unfairness in the sequence of events, even if



1 innocent. So I am not going to do anything, but I do  
2 appreciate you bringing it to my attention, and I will see you  
3 all tomorrow at 10:00.

4 Thank you.

5 (Adjourned to September 12, 2017, at 10:00 a.m.)  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25